

cc: J Conner; M J Smyser; Atty Steenour,  
 Gemmill; Courtney; Hanna

(35)  
 09/26/02

UNITED STATES DISTRICT COURT  
 FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AMERICAN TOWER, L.P.,	:	CIVIL NO: 1:CV-00-2234
Plaintiff,	:	
	:	(Judge Conner)
v.	:	
	:	(Magistrate Judge Smyser)
ZONING HEARING BOARD OF	:	
MONROE TOWNSHIP,	:	
CUMBERLAND COUNTY,	:	
PENNSYLVANIA and	:	
MONROE TOWNSHIP, CUMBERLAND	:	
COUNTY, PENNSYLVANIA,	:	
Defendants	:	

**FILED**  
 HARRISBURG, PA

SEP 26 2002

MARY E. D'ANDREA, CLERK  
 Per [Signature]  
 Deputy Clerk

REPORT AND RECOMMENDATION

The plaintiff, American Tower, L.P., commenced this action by filing a complaint on December 22, 2000. The plaintiff claims that the defendants, the Zoning Hearing Board of Monroe Township (Zoning Board) and Monroe Township, improperly denied its application for a variance to construct a 150 foot high wireless communications monopole on property along Route 74 in Monroe Township.

The plaintiff's complaint contains four counts. Count I contains two claims under the Telecommunications Act (TCA).

The first of these claims is that the defendants' denial of the plaintiff's application for a variance has prohibited or has the effect of prohibiting the provision of personal wireless services in violation of 47 U.S.C. § 332(c)(7)(B)(i)(II). The second of these claims is that the defendants by their denial of the plaintiff's application for a variance have unreasonably discriminated among providers of functionally equivalent services in violation of 47 U.S.C. § 332(c)(7)(B)(i)(I). Count II of the complaint is a claim that the Zoning Board's decision denying the plaintiff's application for a variance is not supported by substantial evidence contained in a written record in violation of 47 U.S.C. § 332(c)(7)(B)(iii). Count III is a 42 U.S.C. § 1983 claim based on the defendants' alleged violations of the TCA. Count IV is a claim that the Zoning Board erred at law and abused its discretion.

The defendants filed a motion to dismiss Count III of the Complaint. By a Memorandum and Order dated April 6, 2001, Judge Kane denied the motion to dismiss.

On April 30, 2001, the defendants filed an answer to the complaint.

On September 12, 2001, the defendants filed a motion for summary judgment, and on September 28, 2001, the plaintiff filed a cross-motion for summary judgment. The parties have filed briefs and the motions are ripe for disposition.

By an Order dated July 17, 2002, Judge Kane referred the motions for summary judgment to the undersigned for preparation of a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1).

On September 17, 2002, this case was reassigned from Judge Kane to Judge Conner.

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving

party is entitled to judgment as a matter of law."

Fed.R.Civ.P. 56(c). The moving party bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party may discharge that burden by "'showing'-- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. Once the moving party has met its burden, the nonmoving party may not rest upon the mere allegations or denials of its pleading; rather, the nonmoving party must "set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e).

An issue of fact is "'genuine' only if a reasonable jury, considering the evidence presented, could find for the non-moving party." *Childers v. Joseph*, 842 F.2d 689, 693-94 (3d Cir. 1988) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). A material factual dispute is a dispute

as to a factual issue that will affect the outcome of the trial under governing law. *Anderson, supra*, 477 U.S. at 248. In determining whether an issue of material fact exists, the court must consider all evidence in the light most favorable to the non-moving party. *White v. Westinghouse Electric Co.*, 862 F.2d 56, 59 (3d Cir. 1988).

The plaintiff is engaged in the business of developing, constructing and leasing antennae towers to carriers and providers of personal wireless services. (*Defendants' Statement of Undisputed Facts* at ¶2 and the plaintiff's response thereto). The plaintiff proposed to construct a Personal Wireless Service Facility (PWSF), consisting of a 150 feet high wireless communications monopole and an accessory equipment shelter, on property along Route 74 in Monroe Township, Cumberland County, Pennsylvania. (*Plaintiff's Statement of Undisputed Material Facts* at ¶¶2-3 and the defendants' responses thereto). The proposed site of the PWSF is located in the Township's Agricultural Zone. *Id.* at ¶4. The Township's Zoning Ordinance does not permit construction or use of a PWSF

on property located within the Agricultural Zone. *Id.* at ¶5. PWSFs are permitted in the Township's Conservation and Industrial Zones. *Id.* at ¶ 6.

On August 1, 2000, the plaintiff filed an application for a variance from the Zoning Ordinance to construct the PWSF. *Id.* at ¶7. In addition to requesting a variance, the plaintiff requested that the Zoning Board find the Zoning Ordinance substantively invalid under the Telecommunications Act. (*Doc. 17, Exhibit T-2*). The Zoning Board held hearings on the plaintiff's application on August 23, 2000 and October 25, 2000. (*Plaintiff's Statement of Undisputed Material Facts at ¶11 and the defendants' response thereto*). On December 5, 2000, the Zoning Board issued a written decision denying the plaintiff's application. (*Doc. 17, Exhibit EX-2*).

We will first address the plaintiff's claims under the TCA.

"Congress enacted the TCA to provide 'a pro-competitive, de-regulatory national policy framework designed to rapidly accelerate private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.'" *APT Pittsburgh Ltd. P'ship v. Penn Twp.*, 196 F.3d 469, 473 (3d Cir. 1999). Although seeking to establish such a national framework, the TCA expressly preserves the general authority of state and local governments to make land use decisions "regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A). See *Town of Amherst v. Omnipoint Communications Enters., Inc.*, 173 F.3d 9, 13 (1<sup>st</sup> Cir. 1999) (stating that Section 332(c)(7) of the TCA "is a deliberate compromise between two competing aims - to facilitate nationally the growth of wireless telephone service and to maintain substantial local control over siting of towers."). However, the TCA places several substantive and procedural limits upon local governments' regulation of the

placement, construction and modification of personal wireless service facilities. *APT Pittsburgh, supra*, 196 F.3d at 473.

Three of the TCA's limitations are at issue in this case. The first is the TCA's ban on regulations that "prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II).

Every denial of an application to build a PWSF will, to some degree, have the effect of prohibiting personal wireless service because it will preclude the applicant from building a facility to serve its customers. *APT Pittsburgh, supra*, 196 F.3d at 478. To interpret the TCA to prohibit "every individual zoning denial simply because it has the effect of precluding a specific provider from providing wireless services, however, would give the TCA preemptive effect well beyond what Congress intended" and would be inconsistent with the structure of § 332(c)(7). *Id.* at 478-79. To establish a violation of 47 U.S.C. § 332(c)(7)(B)(i)(II), an applicant must "show more than that it was denied an opportunity to fill a gap



in its service system." *Id.* at 480. The Third Circuit has adopted a two-part test. "First, the provider must show that its facility will fill an existing significant gap in the ability of remote users to access the national telephone network." *Id.* Since the relevant gap is a gap in the service available to remote users and not all gaps in a particular provider's service will involve a gap in the service available to remote users, the applicant must show "that the area the new facility will serve is not already served by another provider." *Id.* "Second, the provider applicant must also show that the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve." *Id.* "This will require a showing that a good faith effort has been made to identify and evaluate less intrusive alternatives, e.g., that the provider has considered less sensitive sites, alternative system designs, alternative tower designs, placement of antennae on existing structures, etc." *Id.*

In the instant case, the plaintiff has failed to establish a significant gap in the ability of remote users to access the national telephone network. At the hearing before the Zoning Board, the plaintiff presented the testimony of Hoo Tan Roosta, the president of an engineering consulting firm. Mr. Roosta testified about bench-marking tests that he performed. Those tests revealed that there is a gap in coverage around the proposed site on the Cellular A Band, the band utilized by AT&T. *Doc. 17, Exhibit Ex-1 at 23.* Mr. Roosta, however, testified that there was not a gap in coverage under the Cellular B band, the band utilized by Verizon. *Id. at 22.* Jesse Kopelman, a radio frequency engineer with AT&T wireless, provided similar testimony. *Id. at 35 & 71.* The plaintiff has not established that the area that the proposed PWSF will serve is not already served by another provider. Accordingly, the defendants are entitled to summary judgment on the plaintiff's 47 U.S.C. § 332(c)(7)(B)(i)(II) claim.

Another limitation imposed by the TCA on local governments' regulation of the placement, construction and

modification of personal wireless service facilities is a ban on regulations which "unreasonably discriminate among providers of functionally equivalent services." 47 U.S.C.

§ 332(c)(7)(B)(i)(I).

"To preserve the ability of local governments and zoning boards to take into account the uniqueness of land, the TCA 'explicitly contemplates that some discrimination . . . is allowed.'" *Nextel West Corp. v. Unity Township*, 282 F.3d 257, 266 (3d Cir. 2002) (quoting *AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*, 155 F.3d 423, 427 (4<sup>th</sup> Cir. 1998)).

"Any discrimination need only be reasonable." *Id.* "Another two-prong test emerges from this provision." *Id.* Under the first prong, the applicant must establish "that providers of 'functionally equivalent services' were treated differently that it was." *APT Pittsburgh v. Lower Yoder Twp.*, 111 F.Supp.2d 664, 674 (W.D.Pa. 2000). Under the second prong, the question is whether the governmental body unreasonably discriminated among providers. *Nextel West Corp.*, *supra*, 282 F.3d at 266. Localities may "treat facilities that create

different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements even if those facilities provide functionally equivalent services." H.R. Conf. No. 104-458 at 208, reprinted in 1996 U.S.C.C.A.N. at 222. The applicant must show that the other provider is "'similarly situated, i.e. that the 'structure, placement or cumulative impact' of the existing facilities makes them as or more intrusive than the proposed facility.'" *Nextel West Corp.*, *supra*, 282 F.3d at 266 (quoting *APT Pittsburgh*, *supra*, 196 F.3d at 480 n.8.). "Discrimination may be impermissible where a municipality favors one provider by permitting it to locate in a particular area at the exclusion of others, thereby creating unfair competitive advantage." *Id.*

In the instant case, the plaintiff presented evidence before the Zoning Board that it owns another tower in the Township. *Doc. 17, Exhibit EX-1 at 86.* This other tower is located in one of the industrial zones in the Township. *Id.* at 95. The plaintiff owns the tower and leases space on the tower

to two wireless providers - Omnipoint and Nextel. *Id.* at 86-87. Matthew Bucey, an employee of the plaintiff, testified about the area in which the existing tower is located and the area in which the proposed tower would be located. *Id.* at 87-99. Mr. Bucey testified that the existing tower, which is a 150 feet lattice-type structure, is located close to a dense residential area. *Id.* at 94 & 105. He testified that at the proposed site existing trees and the topography of the area would provide a lot of natural screening for the proposed tower, which would be a monopole-type tower. *Id.* at 94-95 & 106. He testified that a tower on the proposed site would be less visually intrusive than the existing tower. *Id.* at 94.

The plaintiff has not presented any evidence that the Township has allowed others to build a tower in an agricultural zone. It is not unreasonable for the Township to treat requests to build towers in different zones differently. See *Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630, 639 (2<sup>nd</sup> Cir. 1999) ("local governments may reasonably take the location of the telecommunications tower into consideration when deciding

whether . . . to approve the application for construction of wireless telecommunications facilities, even though this may result in discrimination between providers of functionally equivalent services." ). It is not unreasonable for the Township to allow a tower in an industrial district but not in an agricultural district. See H.R. Conf. No. 104-458 at 208, reprinted in 1996 U.S.C.C.A.N. at 222 ("[T]he conferees do not intend that if a State or local government grants a permit in a commercial district, it must also grant a permit for a competitor's 50-foot tower in a residential district." ). This is not a case where the Township has permitted one provider to locate in a particular area at the exclusion of others, thereby creating unfair competitive advantage. The plaintiff has failed to establish that the defendants unreasonably discriminated against it. Accordingly, the defendants are entitled to summary judgment on the plaintiff's 47 U.S.C. § 332(c)(7)(B)(i)(I) claim.

The third limitation at issue in this case imposed by the TCA on local governments' regulation of the placement,

construction and modification of personal wireless service facilities is a procedural requirement. 47 U.S.C.

§ 332(c)(7)(B)(iii) provides that "[a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record." The substantial evidence requirement applies "to determinations of factual issues made by a state or local authority in the course of applying state and local zoning law." *APT Pittsburgh, supra*, 196 F.3d at 474. "In the context of § 332(c)(7)(B)(iii), the decision process itself is governed by applicable state and local zoning laws," and "[t]he reviewing court's task is to determine whether the decision, as guided by local law, is supported by substantial evidence." *Cellular Telephone Co. v. Zoning Bd. of Adjustment of the Borough of Ho-Ho-Kus*, 197 F.3d 64, 72 (3d Cir. 1999).

Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a

conclusion. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). In an adequately developed factual record, substantial evidence may be "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [the decision] from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). A reviewing court's task is to determine whether there is substantial evidence in the record as a whole to support the decision, and the reviewing court does not have the power either to weigh the evidence contained in the record or to substitute its own conclusions for those of the fact-finder. *Cellular Telephone*, *supra*, 197 F.3d at 71. Nevertheless, if there is conflicting evidence, the fact-finder must explain its reasons for rejecting or discrediting competent evidence. *Id.*

In the instant case, the plaintiff asserts that it is not challenging the Zoning Board's decision denying its request for a variance. It appears that the plaintiff is claiming that the Zoning Board's rejection of its challenge based on the TCA



was not supported by substantial evidence. However, the substantial evidence standard does not apply to the issues raised by the plaintiff's challenge based on the TCA. See *APT Pittsburgh, supra*, 196 F.3d at 475 (holding that the substantial evidence standard of § 332(c)(7)(B)(iii) does not apply to the issue of whether a denial of an application to construct a personal wireless service facility has the effect of prohibiting the provision of personal wireless services); *APT Pittsburgh v. Lower Yoder Twp.*, 111 F.Supp.2d at 676 (holding that the substantial evidence standard of § 332(c)(7)(B)(iii) does not apply to the issue of whether a municipality unreasonably discriminated among providers of functionally equivalent services).

The plaintiff argues that the applicable state and local law in this case is § 604.1 of the Zoning Ordinance and § 916.1 of the Pennsylvania Municipalities Planning Code, 53 P.S. § 10916.1.

The plaintiff asserts that § 604.1 of the Zoning Ordinance requires the Zoning Board to hear and render decisions on substantive challenges to the validity of the Zoning Ordinance. In this case, the Zoning Board did hear and decide the plaintiff's substantive challenges based on the TCA, the only substantive challenges raised by the plaintiff.

Section 916.1 of the Pennsylvania Municipalities Planning Code sets forth the procedure for raising and deciding substantive challenges to the validity of a zoning ordinance and requires *inter alia* that the determination of a substantive challenge be based upon the testimony presented at the hearing. The plaintiff contends that the Zoning Board failed to base its determination as to the validity of the Zoning Ordinance on the testimony presented at the hearing. The plaintiff contends that Zoning Board failed to based its decision on the testimony presented at the hearing because the Zoning Board failed to credit the evidence presented by the plaintiff regarding the alleged gap in coverage and the evidence presented by the plaintiff to the effect that the proposed tower would be less

intrusive than an existing tower. This is just another way to argue that the Zoning Board's decision regarding the plaintiff's TCA claim was not supported by substantial evidence. As already noted, such determinations are not subject to the substantial evidence standard.

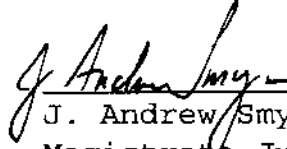
Given that the plaintiff has asserted that it is not challenging the Zoning Board's decision denying a variance, which is the only decision in this case that is subject to the substantial evidence standard of § 332(c)(7)(B)(iii), the defendants are entitled to summary judgment on the plaintiff's 47 U.S.C. § 332(c)(7)(B)(iii) claim.

Count III of the complaint is a 42 U.S.C. § 1983 claim based on the defendants' alleged violation of the TCA. The United States Court of Appeals for the Third Circuit has recently held that by creating a comprehensive remedial scheme that furnishes private judicial remedies the TCA implicitly precludes an action under 42 U.S.C. § 1983. *Nextel Partners Inc. v. Kingston Twp.*, 286 F.3d 687 (3d Cir. 2002).

Accordingly, the plaintiff's 42 U.S.C. § 1983 claim should be dismissed.

Finally, Count IV of the complaint is a claim that the Zoning Board erred and abused its discretion in denying the plaintiff's application. In this regard, the plaintiff contends that the Zoning Board erred and abused its discretion by denying its substantive challenges under the TCA. As the discussion regarding the plaintiff's substantive challenges under the TCA indicates, the Zoning Board did not err or abuse its discretion. Accordingly, the defendants are entitled to summary judgment on this claim.

Based on the foregoing, it is recommended that the defendants' motion (doc. 14) for summary judgment be granted, that the plaintiff's motion (doc. 19) for summary judgment be denied and that the case file be closed.

  
J. Andrew Smyser  
Magistrate Judge

Dated: 9-26-02.

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 : (Magistrate Judge Smyser)  
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CUMBERLAND COUNTY, :  
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MONROE TOWNSHIP, CUMBERLAND :  
COUNTY, PENNSYLVANIA, :  
Defendants :

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Per J. Andrew Smyser  
Deputy Clerk

NOTICE

Any party may obtain a review of the Report and Recommendation pursuant to Rule 72.3 of the Rules of Court, M.D.Pa., which provides:

Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. §636(b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition **within ten (10) days** after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

J. Andrew Smyser  
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Magistrate Judge

Dated: 9-26-02